OFFICIAL SHORT CITATION NAME: When referring to 2010 OEA 15, cite this case as ***Former 7-Eleven*, 2010 OEA 15.**

TOPICS:
summary judgment
underground storage tanks
Excess Liability Trust Fund
tank fees
328 IAC 1-3-3(b)
Rule
non-rule policy document

PRESIDING JUDGE:
Catherine Gibbs

PARTY REPRESENTATIVES:
Petitioner: Amy E. Romig, Esq., Karen B. Scheidler, Esq.; Plews Shadley Racher & Braun
IDEM: Julie Lang, Esq.

ORDER ISSUED:
January 22, 2010

INDEX CATEGORY:
Land

FURTHER CASE ACTIVITY:
[none]

STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	

IN THE MATTER OF:	)	
	)	
OBJECTION TO THE DENIAL OF	)	
EXCESS LIABILITY TRUST FUND CLAIM	)	
ELTF #200809507 / FID #8861	)	
FORMER 7-ELEVEN STORE 32570	)	CAUSE NO. 09-F-J-4236
C&J REALTY / MDK CORPORATION	)	
GRANGER, ST. JOSEPH COUNTY, INDIANA	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter having come before the Court on the Indiana Department of Environmental Management's Motion for Summary Judgment and the Petitioner's Motion for Summary Judgment, which pleadings are part of the Court's record; and the Court, being duly advised, and having read the motions, responses, replies, record, pleadings and evidence now finds that judgment may be entered and makes the following findings of fact, conclusions of law and final order.

FINDINGS OF FACT

1. Petitioner C & J Realty/MDK Corporation (the Petitioner) owns a gasoline station located at 15046 SR 23 in Granger, Indiana (the Site).

2. On December 11, 2008, the Petitioner applied for a determination of whether the Site was eligible for reimbursement from the Excess Liability Trust Fund (the ELTF). On February 18, 2009, the Indiana Department of Environmental Management (the IDEM) notified the Petitioner that the Site was eligible to receive reimbursement, but at a reduced percentage. The IDEM determined that Petitioner had paid 55% of the underground storage tank (UST) annual fees due at the time the release was reported to IDEM (2008) and therefore should be reimbursed only 55% of eligible corrective action costs.

3. The IDEM alleged that the owner or operator of the USTs failed to pay 4 out of 5 tank fees for 1988 and none of the tank fees due for the years 1989 through 1996.

4. The IDEM concedes that tank fees were not due in 1996 and therefore the Petitioner is eligible to receive 59%.

5. A waste oil tank was removed in 1989. The remaining USTs were removed in 1995. After the Petitioner purchased the property in 1995, new USTs were installed. Tank fees were due on the new USTs starting in 1997.

CONCLUSIONS OF LAW

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to I.C. § 4-21.5-7-3.

2. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.

3. This Court must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.,* 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency's initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d). "*De novo* review" means that:

   > all issues are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings.

   Grisell v. Consol. City of Indianapolis, 425 N.E.2d 247 (Ind.Ct.App. 1981).

4. The OEA may enter judgment for a party if it finds that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to judgment as a matter of law." I.C. § 4-21.5-3-23. The moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be construed in favor of the non-movant. *Gibson v. Evansville Vanderburgh Building Commission, et al*., 725 N.E.2d 949 (Ind.Ct.App. 2000).

5. I.C. § 13-23-12 requires owners or operators of USTs to pay annual fees for every UST in the ground on July 1 of each year, beginning in 1988.

6. I.C. § 13-23-8-4(a)(2) states that an owner or operator of USTs is eligible to receive reimbursement from the ELTF if the owner or operator has "paid all registration fees that are required under rules adopted under I.C. § 13-23-8-4.5[1]."

7. Further, I.C. § 13-23-8-4(a)(3) requires that the owner or operator provide proof to the IDEM that the fees have been paid, as part of the application for reimbursement from the ELTF.

8. The applicable regulation promulgated under I.C. § 13-23-8-4.5 is 328 IAC 1-3-3(b). 328 IAC 1-3-3(b) sets out the procedure for determining an owner or operator's eligibility when the owner or operator has paid less than all applicable fees. The rule, in pertinent part, states:

[1] This statute requires the Financial Assurance Board to adopt rules establishing standards and procedures when an owner or operator has failed to pay all fees. These rules were promulgated under 328 IAC 1.

(b) Persons listed in section 1 of this rule shall be eligible to apply to the fund for reimbursement from the fund according to the following formula:

(1) Determine the number of payments that were owed under I.C. § 13-23-12-1 on all regulated tanks at the facility from which a release occurred, beginning with the date that the fees for each tank first became due under I.C. § 13-23-12 and continuing until the date on which the release occurred.
(2) Determine the number of payments actually made under I.C. § 13-23-12-1 on all regulated tanks at the facility from which a release occurred, beginning with the date each tank became regulated under I.C. § 13-23 and continuing until the date on which the release occurred. Divide the number of payments actually made by the number of payments due as determined in subdivision (1).
(3) Determine the amount of money the person would have received from the fund if all payments due on the date the release occurred had been paid when due and multiply the amount by:

(A) the percentage determined in subdivision (2), if the percentage is fifty percent (50%) or more; or
(B) zero (0), if the percentage determined in subdivision (2) is less than fifty percent (50%).

9. The issue in this cause is the interpretation of the phrase "tanks at the facility from which a release occurred". The IDEM argues that this phrase must be interpreted to include all regulated USTs that were ever present on the property since 1988. In this case, then, IDEM is arguing that it must calculate eligibility based on the number of fee payments made between 1988 and 2008[2].

10. The Petitioner argues that the phrase must be interpreted to include only those regulated USTs from which the release actually occurred. The Petitioner argues that eligibility should be based on the number of fee payments made on the USTs between 1997 (the year that the new USTs came into service) and 2008 because these are allegedly the USTs from which the release occurred.

11. When interpreting a statute or regulation, the Court must apply certain rules of statutory construction. "The cardinal rule of statutory construction is to ascertain the intent of the legislature by giving effect to the ordinary and plain meaning of the language used." *Bourbon Mini-Mart, Inc. v. Commissioner, Indiana Department of Environmental Management*, 806 N.E.2d 14, 20 (Ind.Ct.App. 2004).

[2] This is the year the release was reported.

12. Another rule of statutory interpretation is, "If a statute is subject to interpretation, our main objectives are to determine, effect, and implement the intent of the legislature in such a manner so as to prevent absurdity and hardship and to favor public convenience." *State v. Evans*, 790 N.E.2d 558, 560 (Ind. App., 2003).

13. It is clear from the regulation that the IDEM must consider the fees paid on *all regulated tanks at the facility*. There is no requirement that the release be traced to a specific UST. The rule does not distinguish between USTs that may have been previously located at the facility and USTs installed at a later date. It merely says "all regulated tanks". Applying the plain language of the rule, this should be interpreted to include all regulated tanks, for which fees were due, that were ever located on the facility.

14. The Petitioner's interpretation would require that the identification of the tank which was the source of the release. Given the nature of contamination at most gasoline stations (releases from USTs operated over many years under different standards), this, in many cases, would be a difficult and expensive proposition, if it could be done at all. This creates a hardship to the owners and operators.

15. Further, the IDEM's interpretation is supported by other statutes and regulations which set out the method by which subsequent owners/operators may remedy the failure to pay tank fees by prior owners/operators. I.C. § 13-23-8-4.5 and 328 IAC 1-3-3(a)(4) and (d). If the intent of the legislature and the Financial Assurance Board[3] were to base eligibility on tank fee payments for only those USTs from which the release occurred, then these provisions would be pointless.

16. The Petitioner also argues that the IDEM has a policy that it will not include the years 1988 through 1991 in its eligibility calculations and that contrary to this policy, these years were improperly included in the eligibility calculation. This allegation is based on the affidavit of Steven Browning, a former IDEM employee. Regardless of the wisdom or practicality of requiring the owner/operator to maintain records for many years (over 20 years if a facility was operating in 1988), this is the law and the ELJ will not overturn IDEM's decision based on whether this is the best course of action. The statute clearly requires the IDEM to calculate eligibility based on all years that USTs were present at the facility. The policy that the years 1988 through 1991 should not be included in the calculation is in direct conflict with statutory authority and with the formally promulgated rules; has not been published as a "non-rule policy document" under I.C. § 13-14-1-11.5; and has not been promulgated as a rule. Such a policy does not have the effect of law and is an invalid, unpromulgated rule and is therefore not enforceable. *Indiana-Kentucky Electric Corp. v. IDEM*, 870 N.E.2d 771 (Ind. Ct. App. 2005).

[3] This is the board responsible for promulgating the ELTF rules under 328 IAC.

17. In addition, this ELJ has previously ruled that the IDEM properly included the years 1988 through 1991 in its calculations. *See Objection to Denial of Excess Liability Trust Fund Claim No. 200007524, Unocal 76, East Chicago, Lake County, Indiana*, Cause No. 06-F-J-3738.

18. There is no question of material fact in this matter and summary judgment should be granted in favor of IDEM. The Petitioner, C & J Realty/MDK Corporation is eligible to receive reimbursement of 59% of its eligible corrective action costs.

FINAL ORDER

AND THE COURT, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that the Indiana Department of Environmental Management's Motion for Summary Judgment is **GRANTED.** The Petitioner's Motion for Summary Judgment is **DENIED.** The Petition for Administrative Review is **DISMISSED.**

You are hereby further notified that pursuant to provisions of I.C. § 4-21.5-7.5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of I.C. § 4-21.5. Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 22nd day of January, 2010 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge